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Paper No. 13

JEFFREY FURR
253 N. MAIN STREET
JOHNSTOWN OH 43031

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FEB 04 2004

OFFICE OF PETITIONS

In re Application of :
Steve Guilkey :
Application No. 09/878,578 :
Filed: June 11, 2001 :
Title: DUNNAGE TRANSPORT ORGANIZER :

DECISION ON PETITION

This is a decision on the petition under § 1.137(a) filed November 10, 2003, to revive the above-identified application based on unavoidable delay.

The petition under § 1.137(a) is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within **TWO (2) MONTHS** from the mail date of this decision. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)" or "Renewed Petition under 37 CFR 1.137(b)," as appropriate. Extensions of time under § 1.136(a) are permitted.

BACKGROUND

The above-identified application became abandoned for failure to timely file a reply to the final rejection mailed March 26, 2003. This Office action set a three (3) month shortened statutory period for reply, with extensions of time obtainable under § 1.136(a). No reply having been filed and no extension obtained, the application became abandoned effective June 27, 2003. A Notice of Abandonment was mailed on October 28, 2003.

Consideration of Petition under § 1.137(a)

A grantable petition to revive an unavoidably abandoned application under 37 CFR 1.137(a) must be accompanied by: (1) the reply required to the outstanding Office action or notice, unless previously filed; (2) the petition fee set forth in 37 CFR 1.17(l); (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable; and (4) any terminal disclaimer (and fee as set forth in § 1.20(d)) required pursuant to § 1.137(d). Requirements (1) and (3) are at issue in this case.

As to requirement (1), the proposed reply to a final Office

action required for consideration of a petition to revive must be either (1) a Notice of Appeal (and fee required by law), (2) an amendment that *prima facie* places the application in condition for allowance, (3) the filing of a continuing application, (4) a request for continuing examination under § 1.114, or (5) if applicable, a § 1.129(a) submission. Petitioner's only submission, an amendment, has been determined not to place the application in condition for allowance. As such, the reply is not sufficient to revive this application. See enclosed Advisory Action.

The burden of showing the cause of the delay is on the person seeking to revive the application. Smith v. Mossinghoff, 671 F.2d 533, 538, 213 U.S.P.Q. 977, 982 (D.C. Cir. 1982). Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the "reasonably prudent person standard" in determining if the delay was unavoidable:

The word 'unavoidable' ... is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.

In re Mattullath, 38 App. D.C. 497, 514-15 (1912) (quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 U.S.P.Q. 666, 167-68 (D.D.C. 1963), aff'd, 143 U.S.P.Q. 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith, 671 F.2d at 538, 213 U.S.P.Q. at 982. Nonetheless, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the entire delay was "unavoidable." Haines v. Quigg, 673 F. Supp. 314, 316-17, 5 U.S.P.Q.2d 1130, 1131-32 (N.D. Ind. 1987).

Petitioner's explanation has been considered, but not found adequate to meet his burden of showing that the delay was unavoidable. Petitioner states that a response was timely submitted by facsimile transmission on June 13, 2003. However, petitioner does not submit *prima facie* evidence in the form of a facsimile confirmation that the paper was indeed timely filed. See 37 CFR 1.8(b)¹. In fact, petitioner submits no evidence of

¹ 37 CFR 1.8(b). In the event that correspondence is considered timely filed by being mailed or transmitted in accordance with paragraph (a) of this section, but not received in the Patent and Trademark Office, and the application is held to be abandoned or the proceeding is dismissed, terminated, or decided with prejudice, the correspondence will be considered

the alleged previous timely filing. Additionally, the application file is the Official record of the papers received in the Office in an application. The application file for the instant application has been reviewed and it has been confirmed that no response was received in the Office on June 13, 2003 as no such response is present in the application file.

Alternative Venue under § 1.137(b)

The showing required under §1.137(a) is exacting, and petitioner has not met that showing. Petitioner is not precluded from providing further evidence on request for reconsideration to show that the facts and circumstances of the delay in this case warrant revival under § 1.137(a). However, petitioner is advised of an alternative venue for relief, under § 1.137(b).

Petitioner may file a request for reconsideration pursuant to 37 CFR 1.137(b) on the basis of unintentional delay. A grantable petition under § 1.137(b) must be accompanied by: (1) the reply required to the outstanding Office action or notice, unless previously filed; (2) the petition fee set forth in 37 C.F.R. § 1.17(m); (3) a statement that the "entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unintentional"; and (4) any terminal disclaimer (and fee as set forth in § 1.20(d)) required pursuant to § 1.137(d). (Item (4) is not required in this case).

The filing of a petition under 37 CFR 1.137(b) cannot be intentionally delayed and therefore must be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).

timely if the party who forwarded such correspondence:

- (1) Informs the Office of the previous mailing or transmission of the correspondence promptly after becoming aware that the Office has no evidence of receipt of the correspondence;
- (2) Supplies an additional copy of the previously mailed or transmitted correspondence and certificate; and
- (3) Includes a statement which attests on a personal knowledge basis or to the satisfaction of the Commissioner to the previous timely mailing or transmission.

If the correspondence was sent by facsimile transmission, a copy of the sending unit's report confirming transmission may be used to support this statement.

(c) The Office may require additional evidence to determine if the correspondence was timely filed.

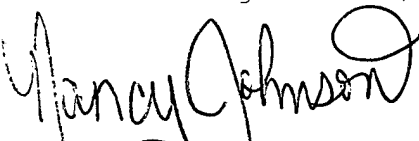
Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petition
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

By FAX: (703) 872-9306
Attn: Office of Petitions
ATTN: NANCY JOHNSON

By hand: CUSTOMER SERVICE WINDOW
2011 South Clark Place
Crystal Plaza Two Lobby
Arlington, VA 22202

Telephone inquiries specific to this decision may be directed to the undersigned at (703) 305-0309.



Nancy Johnson
Senior Petitions Attorney
Office of Petitions

Enclosure: Advisory Action

Advisory Action

Application No.

09/878,578

Applicant(s)

GUILKEY, STEVE

Examiner

Stephen Gordon

Art Unit

3612

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 10 November 2003 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE. Therefore, further action by the applicant is required to avoid abandonment of this application. A proper reply to a final rejection under 37 CFR 1.113 may only be either: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114.

PERIOD FOR REPLY [check either a) or b)]

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
- b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
- ONLY CHECK THIS BOX WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

1. ☐ A Notice of Appeal was filed on _____. Appellant's Brief must be filed within the period set forth in 37 CFR 1.192(a), or any extension thereof (37 CFR 1.191(d)), to avoid dismissal of the appeal.
2. ☒ The proposed amendment(s) will not be entered because:
- (a) ☒ they raise new issues that would require further consideration and/or search (see NOTE below);
- (b) ☐ they raise the issue of new matter (see Note below);
- (c) ☐ they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
- (d) ☐ they present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: See Continuation Sheet.

3. ☐ Applicant's reply has overcome the following rejection(s): _____.
4. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
5. ☐ The a) ☐ affidavit, b) ☐ exhibit, or c) ☐ request for reconsideration has been considered but does NOT place the application in condition for allowance because: _____.
6. ☐ The affidavit or exhibit will NOT be considered because it is not directed SOLELY to issues which were newly raised by the Examiner in the final rejection.
7. ☒ For purposes of Appeal, the proposed amendment(s) a) ☒ will not be entered or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: as per the final rejection.

Claim(s) objected to: as per the final rejection.

Claim(s) rejected: as per the final rejection.

Claim(s) withdrawn from consideration: as per the final rejection.

8. ☐ The drawing correction filed on _____ is a) ☐ approved or b) ☐ disapproved by the Examiner.
9. ☐ Note the attached Information Disclosure Statement(s) (PTO-1449) Paper No(s). _____.
10. ☒ Other: see attached

Stephen Gordon
Primary Examiner
Art Unit: 3612

Continuation of 2. NOTE: At least new claim 17 is not clearly allowable and would require further consideration and/or search..

Applicant should additionally note with respect to the submission of 11-10-03, regarding applicant's proposed amendment to the drawing figure 5 and corresponding amendment to the paragraph on page 5, the term "raise edge 112" in line 5 of the replacement paragraph should be changed to --raised edge 512-- if applicant's proposed changes are maintained. Applicant's proposed amendment does overcome the objection to page 6 of the instant specification raised in the last office action. Finally, the terminology "withdrawn" with respect to claims 15 and 16 is not completely understood. Is it applicant's intent to "cancel" the claims in response to the previous rejections? The status of claims 15-16 should be clarified.